Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1496

WILLIAM CHARLES HOUSER,
d/b/a HOUSER AUTOMOTIVE,

Petitioner,

v.

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AND JOSEPH M. COINTIN, R. B. WYNNE, JR., REV. MSGR. CARL C. POELKER, FRED SPECKMAN, EDGAR M. HAYWARD, TRUSTEES OF DISTRICT 9, I.A. of M. and A.W., PENSION TRUST AND WELFARE ASSOCIATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Seventh Circuit

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. . . . . .

WILLIAM CHARLES HOUSER,
d/b/a HOUSER AUTOMOTIVE,

Petitioner,

v.

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AND JOSEPH M. COINTIN, R. B. WYNNE, JR., REV. MSGR. CARL C. POELKER, FRED SPECKMAN, EDGAR M. HAYWARD, TRUSTEES OF DISTRICT 9, I.A. of M. and A.W., PENSION TRUST AND WELFARE ASSOCIATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Seventh Circuit

Petitioner, William Charles Houser d/b/a Houser Automotive, seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 19, 1978.

OPINIONS BELOW

The unreported Order of the Court of Appeals affirming the decision of the United States District Court for the Southern District of Illinois, Southern Division is reproduced at Appendix A-13 and A-21. The unreported decision and order of the District Court is reproduced at Appendix A-7. The unreported modified decision and order of the District Court is reproduced at Appendix A-10.

JURISDICTION

The Order of the Court of Appeals was entered on January 19, 1978. This petition for writ of certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether an Order of the National Labor Relations Board remedying an unfair labor practice, as finally and unreviewably interpreted and determined by the General Counsel of the National Labor Relations Board, must be considered final and binding, or at least afforded substantial weight, in a proceeding in the courts pursuant to 29 U.S.C. §185 involving the identical operative facts as were before the National Labor Relations Board and its General Counsel.

(2) Whether a determination by the General Counsel of the National Labor Relations Board not to issue an unfair labor practice complaint, which determination is final and not subject to review, must be considered final and binding, or at least afforded substantial weight, in a proceeding in the courts

pursuant to 29 U.S.C. §185 involving the identical operative facts as were before the General Counsel.

(3) Whether 29 U.S.C. §185 may be utilized as a collateral review mechanism to review a Decision and Order of the National Labor Relations Board remedying an unfair labor practice outside the review procedure provided in 29 U.S.C. §§160(e) and (f), in a case involving identical operative facts as were before the National Labor Relations Board.

(4) Whether 29 U.S.C. §185 may be utilized as a collateral review mechanism to review a determination of the General Counsel not to issue a complaint upon an unfair labor practice charge, in a case involving identical operative facts as were before the General Counsel.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, et. seq., are set forth at Appendix A-23.

STATEMENT OF THE CASE

Respondents, District No. 9, International Association of Machinists and Aerospace Workers (herein "Union") and the Trustees of the District 9, I.A. of M. and A.W. Pension Trust and Welfare Association instituted this action in the District Court below under the provisions of 29 U.S.C. §185 alleging that Petitioner had violated the terms of two successive collective bargaining agreements, the 1970-1973 Standard Automotive Agreement and the 1973-1976 Standard Automotive Agreement, by failing and refusing to make payments into the Pension Trust and

Welfare Association. Petitioner answered, inter alia, that he was not liable for the amounts alleged to be due and owing, and that he had neither entered into nor was bound by the 1973-1976 Standard Automotive Agreement.

Petitioner and Respondents were parties to the 1970-1973 Standard Automotive Agreement until its expiration on July 31, 1973. Petitioner, although not a member of the area-wide automotive employer association, executed a "letter-agreement" on August 8, 1973 which stated that Petitioner would implement a thirty-five cent (35¢) per hour wage increase, effective August 1, 1973, and would ". . . abide by any settlement made under the Automotive Dealer Agreement . . . ." The Union and the employer association thereafter executed a new collective bargaining agreement (the 1973-1976 Standard Automotive Agreement).

The National Labor Relations Board (herein "Board"), acting upon an unfair labor practice charge filed by the Union, issued a Complaint (Case No. 14-CA-7600) alleging that Petitioner had refused to bargain in good faith with the Union by unilaterally dealing with unit employees in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended (herein "Act"), 29 U.S.C. §§158(a)(1) and (5). 1/ Petitioner claimed, inter alia, that he had an objective good faith doubt as to the Union's majority status.

1/ A similar Complaint was issued upon charges filed by the Automotive, Petroleum and Allied Trades Local Union No. 971, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, not herein relevant.

The Board found that the presumption of the Union's majority status, which followed from prior contractual relations, remained unrebutted and that Petitioner had refused to bargain with the Union in violation of Sections 8(a)(1) and (5) of the Act (29 U.S.C. §§158(a)(1) and (5)). The Board stated:

> "Most significant, if not determinative, on the issue of good-faith doubt is respondent's voluntary acceptance and signing of the 'letter-agreement' presented to it on August 8, 1973 — only a week after the last contract expired. Respondent thereby undertook to 'continue to operate under the provisions of the [expired] 1970-1973 Agreement' with Machinists. It also agreed 'to abide by any settlement' to be reached by Machinists and the Employer Association in pending negotiations and, in the interim, to put in effect a 35-cent across-the-board hourly increase — which it implemented faithfully. These actions do not depict an employer in doubt as to the Union's majority status. The presumption flowing from its past contractual relations with Machinists was enhanced by the execution of the new agreement. Even if previously quiescent, Respondent's action operated not only formally to renew or extend, but also to breathe new life into the technically expiring formal contractual relationship."

The Board further stated, in footnote 29:

"Contrary to Respondent's contention, the letter-agreement is more than an 'interim wage adjustment' and 'agreement to agree in the future.' The instrument expressly bound the parties to follow and apply the contract to be concluded by the Union and Employer Association — a not unusual procedure in dealings with 'independents' like Respondent. In any event, Respondent's contention that the letter-agreement is not 'enforceable' under 'basic contract law' is unsound. It has, moreover, repeatedly been pointed out that the strict rules governing 'ordinary contracts' do not necessarily apply to collective labor agreements. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550."

The Board ordered Petitioner "[u]pon request, to meet and bargain with the . . . Union as the exclusive representative of all employees in the appropriate bargaining unit, and embody in a signed agreement any understanding reached."2/

The Union requested Petitioner to meet with it to discuss the application and administration of the "existing agreement", the 1973-1976 Standard Automotive Agreement. Petitioner expressed his willingness to meet and bargain with the Union, but denied that he was bound by the 1973-1976 Standard Automotive Agreement under the terms of the Board's affirmative order. The

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2/ No exceptions having been filed, the Decision and Order of the Administrative Law Judge was adopted by the Board.

Union then filed an unfair labor practice charge with the Board alleging that there was a collective bargaining agreement in effect between Petitioner and the Union, and that Petitioner had refused to meet with the Union to discuss its application and administration, in violation of 29 U.S.C. Sections 158(a)(1) and (5).

The Regional Director of the Board, Region 14, refused to issue a Complaint (Appendix A-1), concluding that Petitioner had not refused to bargain with the Union, as the Union had not requested any negotiations, and because

> ". . . the Order in Case No. 14-CA-7600 did not require the Employer to either execute or implement the new association contract . . . ." Appendix A-3.

The Union appealed the Regional Director's determination to the General Counsel, arguing that Petitioner was in fact bound to follow and apply the 1973-1976 Standard Automotive Agreement, and requested that either a complaint be issued or that the Order of the Board be clarified. Appendix A-4. The General Counsel affirmed the decision of the Regional Director. Appendix A-6.

The District Court concluded that Petitioner was bound by the terms and conditions of the 1973-1976 Standard Automotive Agreement, and entered summary judgment for Respondents against Petitioner. Appendix A-8; A-11. Petitioner appealed to the Court of Appeals, which affirmed the decision of the District Court. Appendix A-13; A-21. The Court of Appeals held:

> "While we agree that the original Board order did not require execution of the 1973-1976 Agreement, we

conclude . . . that this is because the Board viewed the Company as already bound by that Agreement by its act of signing the letter-agreement of August 8, 1973. Insofar as the letter of the Regional Director indicates that the Company is not bound by the 1973-1976 Agreement, we decline to accept this interpretation. In any case, neither the Board nor the Regional Director were squarely faced with the issue presented here. Therefore, upon independent determination, we hold that the defendant is bound by the terms of the 1973-1976 Standard Automotive Agreement." Appendix A-18, A-19.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Of Appeals Is In Conflict With Both The Statutory Scheme Of The National Labor Relations Act And Applicable Decisions Of This Court.

In determining the pivotal issue in this case, whether Petitioner was bound by the terms and conditions of the 1973-1976 Standard Automotive Agreement, the Court of Appeals improperly invaded the statutorily created and judicially defined province of the Board to act upon and remedy the commission of an unfair labor practice, specifically, a refusal to bargain by an employer in violation of 29 U.S.C. §§158(a)(1) and (5). By holding that Petitioner was in fact bound by that Agreement, contrary to the explicit terms of the Board's affirmative Order and the findings of the General Counsel in refusing to issue a Complaint upon operative facts identical to those involved in the instant

litigation, the Court of Appeals radically departed from both the scheme of administration of the Act and applicable decisions of this Court.

In structuring the Act, Congress entrusted the Board with the task of remedying the effects of unfair labor practices. See, 29 U.S.C. §§160(a) and (c). It has long been established that the Board, not the courts, is to determine how the effects of an unfair labor practice are to be expunged. This is a matter committed to agency discretion, subject only to limited judicial review. See, NLRB v. J. H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969); NLRB v. Gissel Packing Co., 395 U.S. 575, 612 n.32 (1969); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964); NLRB v. United Mine Workers, 355 U.S. 453 (1958); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953); Virginia Electric and Power Co. v. NLRB, 319 U.S. 533, 539-540 (1943); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); NLRB v. Link-Belt Co., 311 U.S. 584, 600 (1941); International Association of Machinists v. NLRB, 311 U.S. 72, 82 (1940), reh. denied, 311 U.S. 729 (1941); NLRB v. Mackay Radio and Tel. Co., 304 U.S. 333, 348 (1938); NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261, 271 (1938).

It is also firmly established that "the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." Vaca v. Sipes, 386 U.S. 171, 182 (1967). See also, NLRB v. Sears, Roebuck and Co., 421 U.S. 132, 138-139 (1975); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); 29 U.S.C. §153(d).

Prior to the institution of this litigation, the General Counsel reviewed the Decision and Order of the Board, upon the unfair labor practice

charge filed by the Union alleging that Petitioner had violated 29 U.S.C. §§158(a)(1) and (5) by refusing to meet with the Union to discuss the application and administration of a collective bargaining agreement to which Petitioner was bound, the 1973-1976 Standard Automotive Agreement. The Regional Director of the Board, Region 14, refused to issue a complaint, finding that the Board, as part of its remedy, had not required Petitioner to either execute or implement that Agreement. The General Counsel of the Board, upon the appeal of the Union, adopted the conclusion reached by the Regional Director and in the exercise of his statutory discretion, refused to issue a complaint.

Had the General Counsel drawn the conclusion that the Board had in fact held that Petitioner was required to implement and execute the 1973-1976 Standard Automotive Agreement, 3/ the General Counsel could have exercised any one of three available statutory options: (1) issued an unfair labor practice complaint, charging Petitioner with violating 29 U.S.C. §§158(a)(1) and (5) for refusing to execute the 1973-1976 Standard Automotive Agreement; (2) petitioned the Court of Appeals for enforcement of the Order of the Board, pursuant to 29 U.S.C. §160(e); or, (3) moved to modify or set aside the Order of the Board, pursuant to

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3/ Requiring a person to implement and execute a collective bargaining agreement to which he has agreed is well within the power of the Board. See, NLRB v. Strong, 393 U.S. 357 (1969); H. J. Heinz v. NLRB, 311 U.S. 514 (1941); Monument Printing and Publishing Co., 231 NLRB No. 105, 96 LRRM 1177 (1977).

29 U.S.C. §160(d). Instead, the General Counsel held that Petitioner was not bound by the terms and conditions of the 1973-1976 Standard Automotive Agreement, precisely the conclusion rejected by the Court of Appeals.

The Court of Appeals, upon "independent determination", improperly entered the exclusive statutory province of the Board to remedy unfair labor practices, and "declined" to accept the heretofore unreviewable determination of the General Counsel not to issue an unfair labor practice complaint. In addition, the Court of Appeals failed to defer to the determinations of the Board, but instead improperly substituted its own determination. See, NLRB v. Pipefitters Local No. 638, 429 U.S. 507, 528 (1977); Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298, 303-304 (1977); NLRB v. Boeing Co., 412 U.S. 67, 75 (1973); NLRB v. United Insurance Co. of America, 390 U.S. 254, 260 (1968); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963).

The decision of the Court of Appeals is clearly contrary to both the statutory scheme of the Act and applicable decisions of this Court. Failure to review the decision of the Court of Appeals will result in the sanctioning of a radical departure from established judicial deferral to the expertise and discretion of the Board. Now, through the vehicle of a 29 U.S.C. §185 litigation, a charging party who disputes the order of the Board remedying a refusal to bargain can go to the courts with the identical operative facts as were considered by the Board and obtain a contrary ruling. Such a course of proceeding has never been and cannot now be sanctioned.

II. The Decision Of The Court Of Appeals Presents Important Questions Of Federal Law Which Should Be Decided By This Court.

The effect of the decision of the Court of Appeals is to create, through a 29 U.S.C. §185 action, a collateral procedure whereby a decision and Order of the Board remedying an employer's refusal to bargain, and an exercise of discretion by the General Counsel of the Board in refusing to issue an unfair labor complaint, may be reviewed in the courts. Upon identical operative facts as were before the Board and the General Counsel, the Court of Appeals reviewed the proceedings before the Board and the General Counsel and substituted its judgment upon "independent determination" over matters properly reserved for agency discretion.

These important questions in the administration of the Act, viz, to what extent a 29 U.S.C. §185 litigation may be utilized as a collateral review mechanism to review a decision and order of the Board remedying an unfair labor practice, and a refusal to issue an unfair labor practice complaint by the General Counsel, have never before been considered by this Court, but should now be decided.

The Act only contemplates direct review of a decision and order of the Board through 29 U.S.C. §§160(e) or (f). Here, neither the Board nor the Union exercised the available review procedures. The Board, both through its remedial order and through the General Counsel, held that Petitioner was not bound by the terms and conditions of the 1973-1976 Standard Automotive Agreement, and did not seek enforcement of its Order through 29 U.S.C.

§160(e). The Union, as a "person aggrieved by a final order of the Board . . .", 4/ did not utilize the only statutory review available, 29 U.S.C. §160(f). See, NLRB v. Oil, Chemical and Atomic Workers, 476 F.2d 1031, 1033-1034 (1st Cir. 1973). Instead, collateral review of both the decision of the Board and the refusal of the General Counsel to issue a complaint was sought and afforded. The Court of Appeals, by disregarding the rulings of both the Board and the General Counsel, sanctioned this radical departure from the statutory scheme.

That no review may be afforded the General Counsel's refusal to issue an unfair labor practice complaint, see, NLRB v. Sears, Roebuck and Co., supra; Vaca v. Sipes, supra; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), has been consistently followed and applied by the courts. See, e.g., Saez v. Goslee, 463 F.2d 214 (1st Cir. 1972); Mayer v. Ordman, 391 F.2d 889 (6th Cir. 1968), cert. denied, 393 U.S. 925 (1968); Balanyi v. Local 1031, IBEW, 374 F.2d 723 (7th Cir. 1967). The collateral review afforded by the Court of Appeals of the General Counsel's heretofore unreviewable discretionary decision, in a factually identical context, is a clearly improper departure from both established judicial precedent and statutory mandates.

Failing a dispositive declaration by this Court of the propriety of the type of collateral review afforded by operation of the Court of Appeals' decision, an avenue of review, uncontemplated by the Act and heretofore judicially foreclosed, will have been opened. It is submitted that only Congress can provide the

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4/ 29 U.S.C. §160(f).

types of changes in the statutory scheme implemented by the Court of Appeals. Nevertheless, if such an avenue of review is to be afforded, it should only be done through articulated rationale, rather than through the opinion of the Court of Appeals which failed to recognize and deal with the issue.

CONCLUSION

Wherefore, for the foregoing reasons, the instant petition for writ of certiorari should be granted.

Respectfully submitted,

GERALD TOCKMAN
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(314)241-8909
Attorney for Petitioner

APPENDIX

NATIONAL LABOR RELATIONS BOARD
REGION 14
Room 448, 210 North 12th Boulevard
St. Louis, Missouri 63101

November 7, 1974

Re: Houser Automotive
Case No. 14-CA-8205

District No. 9 International
Association of Machinists and
Aerospace Workers, AFL-CIO
12365 St. Charles Rock Road
Bridgeton, Missouri 63044

Attn: Forrest W. Brandon, Grand
Lodge Representative

Gentlemen:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended has been carefully investigated and considered.

As a result of the investigation, it appears there is insufficient evidence that Houser Automotive has refused to bargain with District 9, International Association of Machinists and Aerospace Workers, AFL-CIO, by refusing to meet with District 9 representatives for the purpose of discussing the application and administration of a collective-bargaining agreement presently in effect between Houser Automotive and District 9, in violation of Section 8(a)(1) and (5) of the Act, as alleged. The investigation disclosed that Houser Automotive was signatory to the standard contract between District 9 and the Greater St. Louis Automotive Association, Inc. and St. Clair-Madison Automotive Association, Inc. covering the period from 1970,

through 1973, which expired on July 31, 1973. The investigation also disclosed that on August 8, 1973, District 9 requested and the Employer signed a "letter of agreement" pending finalization of a new standard agreement between the Association and District 9. Thereafter, on September 25, 1973, District 9 filed unfair labor practice charges against Houser Automotive in Case No. 14-CA-7600 alleging that Houser Automotive refused to bargain in good faith with District 9. A complaint issued and a hearing was held before Administrative Law Judge Samuel Singer on December 19, 1973, and January 15, 16, 1974. Prior to the hearing, the above-referred to Employer Associations and the Union executed a new contract effective August 1, 1973 to July 31, 1976. During the unfair labor practice hearing, the "letter of agreement" was litigated by the parties and a new Association contract was placed in evidence. Administrative Law Judge Singer issued his Decision dated March 29, 1974, wherein Houser Automotive was required to bargain in good faith with District 9, but as part of the remedy, the Employer was not required to execute or to implement the new Association contract. No exceptions as provided by Section 102.46 of the Board's Rules and Regulations was filed by any party to the proceeding and on April 30, 1974, the Board adopted the Administrative Law Judge's Decision.

By letter dated May 1, 1974, the Union, District 9, requested a meeting with the Employer in order to discuss the new Association agreement which agreement is applicable to Houser's employees in accord with the "letter of agreement." By letter dated May 7, 1974, the Employer advised the Union that there was no agreement in effect but that it would negotiate with the Union for a collective-bargaining agreement, as required by the above-referred to Board Order. The Union has not requested such negotiations to date.

In these circumstances, as the Order in Case No. 14-CA-7600 did not require the Employer to either execute or to implement the new Association contract, the Employer's refusal to now do so is not violative of the Act. Accordingly, further proceedings are not warranted at this time, and I am, therefore, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D. C. 20570 and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on November 20, 1974. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,
/s/ Joseph H. Solien
Joseph H. Solien
Regional Director

12365 St. Charles Rock Rd.
Bridgeton, Mo. 63044
November 15, 1974

General Counsel
Office of Appeals
Washington, D. C. 20570

Re: HOUSER AUTOMOTIVE
Case No. 14-CA-8205

Gentlemen:

Comes now District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO, and files this request for review of the Regional Director's refusal to issue complaint in Houser Automotive, Case No. 14-CA-8205, in his letter of November 7, 1974.

REASONS FOR REQUEST

Administrative Law Judge Samuel Singer in his decision issued March 29, 1974, in the case of WILLIAM CHARLES HOUSER, d/b/a HOUSER AUTOMOTIVE and AUTOMOTIVE, PETROLEUM AND ALLIED TRADES LOCAL UNION NO. 971, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Case Nos. 14-CA-7594 and 14-CA-7600, specifically stated on page 17 beginning with line 34 of his decision: "Contrary to Respondent's contention, the letter-agreement is more than an "interim wage adjustment" and "agreement to agree in the future." The instrument expressly bound the parties to follow and apply the contract to be concluded by the Union and Employer Association--a not unusual procedure in dealings with "independents' like Respondent."

Since Judge Singer's decision was accepted by the Board as its Decision and Order, it is the position of the Union that the agreement between Houser Automotive and District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO, as referred to in Judge Singer's decision is a valid agreement and continues to be in force and effect between the parties even though Judge Singer did not specifically mention the existing agreement in his standard "form" bargaining order.

District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO, respectfully requests that a complete investigation of the entire record in the subject case be done and that the Regional Director be reversed in his refusal to issue complaint so that a hearing can be conducted before an administrative law judge or that Administrative Law Judge Samuel Singer might be allowed to issue a clarification of his decision in Case Nos. 14-CA-7594 and 14-CA-7600.

Respectfully submitted,
/s/Forrest W. Brandon
Forrest W. Brandon
Grand Lodge Representative, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

[Certificate of Service]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D. C. 20570

December 5, 1974

Re: Houser Automotive
Case No. 14-CA-8205

Mr. Forrest W. Brandon
Grand Lodge Representative
International Assn. of Machinists
& Aerospace Workers, Dist. No. 9
Machinists Building
12365 St. Charles Rock Road
Bridgeton, Missouri 63044

Dear Mr. Brandon:

Due consideration has been given to your appeal from the Regional Director's refusal to issue complaint based on your 8(a)(1) and (5) charge filed October 18, 1974, alleging that the Company had unlawfully refused to meet with the Union for the purpose of discussing the application and administration of a collective bargaining agreement currently in effect.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of November 7, 1974.

Very truly yours,
Peter G. Nash
General Counsel

By /s/ Ronald M. Slatkin
Ronald M. Slatkin
Acting Director,
Office of Appeals

JUDGES CHAMBERS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
ROOM 319, FEDERAL BUILDING
SPRINGFIELD, ILLINOIS 62705

January 24, 1977

Mr. John F. Goffstein
Bartley, Goffstein, Bollato
and Lange
130 South Bemiston Avenue
Clayton, Missouri 63105

Mr. Gerald Tockman
Attorney at Law
706 Chestnut Street, Suite 1010
St. Louis, Missouri 63101

Gentlemen:

Re: District #9, IAM, v. Houser Automotive,
A-Civ-75-8

I have carefully reviewed the pleadings and your briefs in connection with cross motions for summary judgment and the following is in response thereto.

In my opinion the plaintiff is clearly entitled to summary judgment and the defendant is not entitled to prevail on its counterclaim. Under these circumstances the oral arguments set for February 1, 1977, are cancelled.

Counsel for plaintiff is directed to prepare an appropriate order.

Sincerely,
/s/ J. Waldo Ackerman
United States
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al.,	)	
Plaintiffs,	)	
vs.	)	No. A-CIV-75-8
WILLIAM CHARLES HOUSER, d/b/a HOUSER AUTOMOTIVE,	)	
Defendant.	)	

ORDER

After carefully considering the pleadings, motions, memorandums, affidavits and other documents filed in the above-entitled case, the Court issues the following Order:

1. The Court finds that there is no dispute as to any material fact.

2. The Court determines that the Plaintiffs are entitled to summary judgment as a matter of law.

3. The Court finds that the relevant collective bargaining agreement obligates Defendant to pay Plaintiffs' attorneys fees in an amount of not less than 33-1/3% of the judgment herein granted.

WHEREFORE,

4. The Court grants Plaintiffs' Motion for Summary Judgment, denies Defendant's Motion for

Summary Judgment and dismisses Defendant's Counterclaim with prejudice.

5. The Court awards Plaintiffs $13,853.40 consisting of $8,190.40 Pension Trust contributions owed by the Defendant and $5,663.00 consisting of Health and Welfare contributions owed by Defendant.

6. The Court awards interest at a rate of 6% accruing annually from August 1, 1973 and continuing to the date of payment on the total amount awarded in paragraph five (5) of this Order ($13,853.40).

7. In addition to the amounts awarded in paragraphs five (5) and six (6), the Court awards to Plaintiffs and assesses against Defendant, Plaintiffs' attorneys fees in the amount of $4,617.80, said amount representing one-third of the principal amount of the judgment granted herein.

8. The Court assesses all costs of the action against Defendant.

So Ordered:
/s/ Judge J. Waldo Ackerman
Judge J. Waldo Ackerman

Dated: 2-15-77

JUDGES CHAMBERS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
ROOM 319, FEDERAL BUILDING
SPRINGFIELD, ILLINOIS 62705

March 14, 1977

Mr. John H. Goffstein
Bartley, Goffstein, Bollato
and Lange
130 South Bemiston Avenue
Clayton, Missouri 63105

Mr. Gerald Tockman
706 Chestnut Street
St. Louis, Missouri 63101

Gentlemen:

Re: District No. 9, International Association of Machinists and Aerospace Workers, et al., v. William Charles Houser, A-Civ-75-8

I have considered the motion of the defendant to amend the judgment together with the memoranda submitted in support and in opposition thereto.

I will deny the motion to amend the judgment except as to those matters consented to by the plaintiffs.

Attorney for plaintiffs is requested to prepare an amended judgment order accordingly.

Sincerely,
/s/ J. Waldo Ackerman
J. Waldo Ackerman
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

DISTRICT NO. 9, INTER-NATIONAL ASSOCIATION OF MACHINISTS AND AERO-SPACE WORKERS, et al.,	)	
Plaintiffs,	)	
vs.	)	No. A-Civ-75-8
WILLIAM CHARLES HOUSER, d/b/a HOUSER AUTOMOTIVE,	)	
Defendant.	)	

ORDER

After carefully considering the pleadings, motions, memorandums, affidavits and other documents filed in the above-entitled case, the Court issues the following Order:

1. The Court finds that there is no dispute as to any material fact.

2. The Court determines that the Plaintiffs are entitled to summary judgment as a matter of law.

3. The Court finds that the relevant collective bargaining agreement obligates Defendant to pay Plaintiffs' attorneys fees in an amount of not less than 33-1/3% of the judgment herein granted.

WHEREFORE,

4. The Court grants Plaintiffs' Motion for Summary Judgment, denies Defendant's Motion for

Summary Judgment and dismisses Defendant's Counterclaim with prejudice.

5. The Court awards Plaintiffs $13,853.40 consisting of $8,190.40 Pension Trust contributions owed by the Defendant and $5,663.00 consisting of Health and Welfare contributions owed by Defendant.

6. The Court awards Plaintiffs interest at a rate of five percent computed from the day following the due date of each delinquent monthly contribution and the Court further awards interest on the entire amount of the judgment at the rate of six per cent from the date of the entry of this judgment to the date of payment of the total amount awarded.

7. In addition to the amounts awarded in paragraphs five (5) and six (6), the Court awards to Plaintiffs and assesses against Defendant, Plaintiffs' attorneys fees in the amount of $4,617.80, said amount representing one-third of the principal amount of the judgment granted herein.

8. The Court assesses all costs of the action against Defendant.

So Ordered:
/s/ Judge J. Waldo Ackerman
Judge J. Waldo Ackerman

Dated: 3-23-77

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 77-1573

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS and JOSEPH M. COINTIN, R.B. WYNNE, JR., REV. MSGR. CARL C. POELKER, FRED SPECKMAN, EDGAR M. HAYWARD, TRUSTEES OF DISTRICT 9, I.A. of M. and A.W. PENSION TRUST and WELFARE ASSN.,	)	Appeal from the United States District Court for the Southern District of Illinois, Southern Division
Plaintiffs-Appellees,	)	
vs.	)	No. A-Civ-75-8
WILLIAM CHARLES HOUSER, d/b/a HOUSER AUTOMOTIVE,	)	J. Waldo Ackerman, Judge.
Defendant-Appellant.	)	

[January 19, 1978.]

Before SPRECHER and TONE, Circuit Judges, and GRANT, Senior District Judge*

*Senior District Judge Robert A. Grant, of the Northern District of Indiana, is sitting by designation.

O R D E R

The issue presented in this appeal is whether the district court properly granted summary judgment for plaintiffs, requiring defendant Company to pay monies and interest for employee benefit funds under two collective bargaining agreements.

I.

Plaintiffs and defendant were parties to the 1970-1973 Standard Automotive Agreement which expired on July 31, 1973. Although the Company was not a member of the employer association then negotiating a new bargaining agreement with the Union, defendant executed a letter agreement on August 8, 1973, under which defendant agreed to put into effect, effective August 1, 1973, an across-the-board thirty-five cents an hour wage increase. Defendant also agreed to "abide by any settlement made under the Automotive Dealers Agreement..." Thereafter, a new collective bargaining agreement was executed by the Union and the Automotive Dealers (1973-1976 Standard Automotive Agreement).

Plaintiffs brought suit under the provisions of 29 U.S.C. §185 alleging that defendant had violated the terms of the successive collective bargaining agreements by failing and refusing to make payments into the Pension Trust and Welfare Association on behalf of certain employees of the defendant. Defendant answered that it had signed the 1970-1973 Standard Automotive Agreement but denied that it was bound by the 1973-1976 Standard Automotive Agreement, and denied that it was obligated to make any payments either for Pension or Health and Welfare Benefits. The Company claimed that any obligation it may have had ended with the expiration of the 1970-1973 Standard Auto Agreement. The Company also

contested the district court's jurisdiction because there was no collective bargaining agreement presently in effect between the parties, arguing further that if such a collective bargaining agreement was found to exist the Union had failed to exhaust its contractual remedies before instituting litigation.

Plaintiffs and defendant both moved for summary judgment and submitted memoranda, affidavits and other documents in support thereof. On February 15, 1977, the district court entered an order granting plaintiffs' summary judgment motion and denying defendant's motion. This order was modified on March 14, 1977, and finally entered on March 23, 1977. Defendant appeals and our jurisdiction derives from 28 U.S.C. §1291.

II.

The main issue presented is whether defendant was bound by the terms of the 1973-1976 Standard Automotive Agreement. Based on the letter agreement of August 8, 1973, the answer to this question must be that the Company agreed to the subsequent settlement between the Union and the Automotive Dealers Association which resulted in the 1973-1976 Standard Auto Agreement. The Company does not deny that it signed the letter agreement. Rather, it argues that the National Labor Relations Board held in a related dispute that it was not bound by the 1973-1976 Standard Auto Agreement. Thus, the defendant claims that it owes no contributions under Articles XXXIV and XXXV of that Agreement for Health and Welfare or Pension benefits.

In order to resolve this dispute, we must consider the conclusions of the Board and their effect on this case. The Union had filed an

unfair labor practice charge against the Company alleging that the Company refused to bargain in good faith in violation of 29 U.S.C. §§158(a)(1) and (5) by bypassing the Union and dealing unilaterally with unit employees. The Company claimed, inter alia, that it had an objective good faith doubt as to the Union's majority status.

Although the Board, through an Administrative Law Judge, found that much of the unilateral dealing charge was unsupported, the Board did rule that the presumption of the Union's majority status, which followed from prior contractual relations, remained unrebutted. The Board stated:

> Most significant, if not determinative, on the issue of good-faith doubt is respondent's voluntary acceptance and signing of the "letter-agreement" presented to it on August 8, 1973 — only a week after the last contract expired. Respondent thereby undertook to "continue to operate under the provisions of the [expired] 1970-1973 Agreement" with Machinists. It also agreed "to abide by any settlement" to be reached by Machinists and the Employer Association in pending negotiations and, in the interim, to put in effect a 35-cent across-the-board hourly increase — which it implemented faithfully. These actions do not depict an employer in doubt as to the Union's majority status. The presumption flowing from its past contractual relations with Machinists was enhanced by the execution of the new agreement. Even if previously quiescent, Respondent's action operated not only formally to renew or extend, but also to

> breathe new life into the technically expiring formal contractual relationship.

Further, in footnote 29, the Board declared:

> Contrary to Respondent's contention, the letter-agreement is more than an "interim wage adjustment" and "agreement to agree in the future." The instrument expressly bound the parties to follow and apply the contract to be concluded by the Union and Employer Association — a not unusual procedure in dealings with "independents" like Respondent. In any event, Respondent's contention that the letter-agreement is not "enforceable" under "basic contract law" is unsound. It has, moreover, repeatedly been pointed out that the strict rules governing "ordinary contracts" do not necessarily apply to collective labor agreements. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550.

While these statements regarding the contractual relations between the parties were not necessary for the Board's decision and are not controlling upon us, they certainly support the conclusion of the district court that defendant agreed to be bound by the 1973-1976 Standard Automotive Agreement. Defendant, however, points out that the Board, in its remedy, merely required the Company "[u]pon request, to meet and bargain with the ... Union as the exclusive representative of all employees in the appropriate bargaining unit, and embody in a signed agreement any understanding reached." Thus, the Company

claims that it was not required to execute or follow the 1973-1976 Standard Automotive Agreement.

While not without ambiguity, we think that the Board's Decision and Order may be read as having concluded that defendant, by its own acts in signing the letter agreement of August 8, 1973, was bound to follow the terms of the 1973-1976 Standard Automotive Agreement. Indeed, since the Board viewed that the Company was already bound by this Agreement, there was no necessity to require the Company to execute it. Thus, the only real remedy the Board saw necessary was to require the Company to deal with the Union, not the individual employees, with regard to all future contracts.

Defendant points to a later letter written by the Regional Director of the NLRB refusing to issue a complaint against defendant for failure to bargain with the Union. The Regional Director found that the Company had not refused to negotiate since the Union had not requested any negotiations. In passing on this issue, the Regional Director interpreted the previous Board Order to mean that the defendant was not required to execute or implement the 1973-1976 Standard Automotive Agreement, although this interpretation was not necessary to the conclusion reached.

While we agree that the original Board Order did not require execution of the 1973-1976 Agreement, we conclude, as stated previously, that this is because the Board viewed the Company as already bound by that Agreement by its act of signing the letter-agreement of August 8, 1973. Insofar as the letter of the Regional Director indicates that the Company is not bound

by the 1973-1976 Agreement, we decline to accept this interpretation. In any case, neither the Board nor the Regional Director were squarely faced with the issue presented here. Therefore, upon independent determination, we hold that the defendant is bound by the terms of the 1973-1976 Standard Automotive Agreement.

III.

Insofar as we conclude that a collective bargaining agreement existed between the Company and the Union, we hold that, contrary to the defendant's contention, the district court did not lack jurisdiction to hear the controversy under 29 U.S.C. §185. Moreoever, plaintiffs need not have submitted this dispute to arbitration even though Article VIII of the Agreement contains an arbitration clause. This remedy was supplemented by a more specific provision in both Articles XXXIV and XXXV, providing that a suit at law may be brought in addition to all other remedies where there has been a failure to pay Health and Welfare or Pension benefits. Under these circumstances, arbitration was not required and plaintiffs did not fail to exhaust their contractual remedies before instituting litigation.

Finally, defendant argues that the district court should have issued a Memorandum Opinion and made findings of fact and conclusions of law. We disagree and Rule 52(a) of the Federal Rules of Civil Procedure specifically exempts summary judgment decisions under Rule 56 from the requirement that findings of fact and conclusions of law shall be issued.

IV.

Plaintiffs request attorneys' fees in addition to the one-third of the judgment required

as the minimum in the collective bargaining agreement and granted by the district court. We adhere to the award of the district court and conclude that the attorneys' fees granted are sufficient.

Accordingly, for the reasons discussed above, the March 23, 1977, decision of the district court granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment is in all respects AFFIRMED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 77-1573

DISTRICT NO. 9, INTER-NATIONAL ASSOCIATION OF MACHINISTS AND AERO-SPACE WORKERS and JOSEPH F. COINTIN, et al.,	)	Appeal from the United States District Court for the Southern District of Illinois Alton Division.
Plaintiffs-Appellees,	)	
vs.	)	
HOUSER AUTOMOTIVE, d/b/a Charles Houser,	)	No. A-CIV-75-8
Defendant-Appellant.	)	J. Waldo Ackerman, Judge.

[January 19, 1978.]

Before SPRECHER and TONE, Circuit Judges, and GRANT, Senior District Judge*

Unpublished Per Curiam Order

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois,

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* Senior District Judge Robert A. Grant, of the Northern District of Indiana, is sitting by designation.

Alton Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this court entered this date.

STATUTES INVOLVED

National Labor Relations Act

(61 Stat. 136, 73 Stat. 519
29 U.S.C. Sec. 151, et seq.)

Sec. 3(d), 29 U.S.C. §153(d):

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine dine of the session of the Senate in which such nomination was submitted.

Sec. 8(a)(1) 29 U.S.C. §158(a)(1):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. §157].

Sec. 8(a)(5), 29 U.S.C. §158(a)(5):

(a) It shall be an unfair labor practice for an employer—
(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 U.S.C. §159 (a)].

Sec. 10(a), 29 U.S.C. §160(a):

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [29 U.S.C. §158]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [29 U.S.C. §§151-158, 159-168] or has received a construction inconsistent therewith.

Sec. 10(c), 29 U.S.C. §160(c):

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its

discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner

or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Sec. 10(d), 29 U.S.C. §160(d):

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Sec. 10(e), 29 U.S.C. §160(e):

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and

and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such addititonal evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Sec. 10(f), 29 U.S.C. §160(f):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Sec. 301(a), 29 U.S.C. §185(a):

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor

organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Supreme Court, U. S.
FILED
MAY 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1496

WILLIAM CHARLES HOUSER, d/b/a HOUSER AUTOMOTIVE,
Petitioner,

v.

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS and JOSEPH F. COINTIN, R. B. WYNNE, JR., REV. MSGR. CARL C. POELKER, FRED SPECKMANN, EDGAR M. HAYWARD, Trustees of District 9, I.A. of M. and A.W., Pension Trust and Welfare Association,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Authorities Cited

Cases

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1496

WILLIAM CHARLES HOUSER, d/b/a HOUSER AUTOMOTIVE,
Petitioner,

v.

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS and JOSEPH F. COINTIN, R. B. WYNNE, JR., REV. MSGR. CARL C. POELKER, FRED SPECKMANN, EDGAR M. HAYWARD, Trustees of District 9, I.A. of M. and A.W., Pension Trust and Welfare Association,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

The unreported Order of the Court of Appeals affirming the decision of the United States District Court for the Southern

District of Illinois, Southern Division is reproduced at Pet. Appendix A-13; A-21.[1] The unreported decision and order of the District Court is reproduced at Pet. Appendix A-7. The unreported modified decision and order of the District Court is reproduced at Appendix A-10.

JURISDICTION

The Order of the Court of Appeals was entered on January 19, 1978. A petition for writ of certiorari was filed within ninety days of that date. Jurisdiction of the Court has been invoked under 28 U.S.C. § 1254(1). Respondents' Brief in Opposition has been filed within thirty days of the receipt of said Petition for Writ of Certiorari.

QUESTIONS PRESENTED BY PETITIONER

(1) Whether an Order of the National Labor Relations Board remedying an unfair labor practice, as finally and unreviewably interpreted and determined by the General Counsel of the National Labor Relations Board, must be considered final and binding, or at least afforded substantial weight, in a proceeding in the courts pursuant to 29 U.S.C. § 185 involving the identical operative facts as were before the National Labor Relations Board and its General Counsel.

(2) Whether a determination by the General Counsel of the National Labor Relations Board not to issue an unfair labor practice complaint, which determination is final and not subject to review, must be considered final and binding, or at least afforded substantial weight, in a proceeding in the courts pursuant to 29 U.S.C. § 185 involving the identical operative facts as were before the General Counsel.

---

[1] "Pet. Appendix" refers to the Appendix attached to Petitioner's Petition For Writ of Certiorari; "Resps. Appendix" refers to the Appendix attached to this Respondents' Brief in Opposition.

(3) Whether 29 U.S.C. § 185 may be utilized as a collateral review mechanism to review a decision and Order of the National Labor Relations Board remedying an unfair labor practice outside the review procedure provided in 29 U.S.C. §§ 160 (e) and (f), in a case involving identical operative facts as were before the National Labor Relations Board.

(4) Whether 29 U.S.C. § 185 may be utilized as a collateral review mechanism to review a determination of the General Counsel not to issue a complaint upon an unfair labor practice charge, in a case involving identical operative facts as were before the General Counsel.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, et seq., are set forth at pages 23-29 of Pet. Appendix.

STATEMENT OF THE CASE

Respondent, District No. 9, International Association of Machinists and Aerospace Workers (herein "Union") and Petitioner, William Charles Houser d/b/a Houser Automotive (herein "Houser") were formerly parties to a collective bargaining agreement which by its terms expired on July 1, 1973. Although Houser was not a member of the multi-employer association then negotiating a new bargaining agreement with the Union, Houser executed a letter agreement on August 8, 1973, under which Houser agreed to a wage increase effective August 1, 1973 and under which Houser further agreed to be bound by the contract then being negotiated by the Union and the multi-employer association (Resps. Appendix A-1). Thereafter, as contemplated by the letter agreement, a new collective bargaining agreement was executed by the Union and the multi-employer

association (1973-1976 Standard Automotive Agreement, herein "the 1973 contract").

The 1973 contract provided, *inter alia*, for employer contributions to the District No. 9, I.A. of M. and A.W. Pension Trust and the District No. 9, I.A. of M. and A.W. Welfare Association. Individual Respondents Cointin, Wynne, Poelker, Speckmann and Hayward are the Trustees of the Pension Trust and the Welfare Association.

Houser failed and refused to make contributions to the Pension Trust and Welfare Association required under the 1973 contract. Consequently, the Union and the Trustees filed suit in the United States District Court for the Southern District of Illinois under Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. §185, to recover the Houser delinquencies. The District Court granted summary judgment on behalf of the Union and the Trustees (Pet. Appendix A-11; A-12). Houser appealed to the United States Court of Appeals for the Seventh Circuit; the Court of Appeals affirmed the judgment of the District Court (Pet. Appendix, A-13; A-22).

The Union and Houser (but not the Trustees) were also parties to certain proceedings before the National Labor Relations Board (herein "the Board").[2] In Case No. 14-CA-7600 the Board issued a Complaint alleging that Houser had refused to bargain in good faith with the Union by unilaterally dealing with bargaining unit employees in violation of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. §§158(a)(1) and (5). The Board found that Houser had violated Sections 8(a)(1) and 8(a)(5). The Board's decision appears at Resp. Appendix A-2-A-26).

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[2] Respondents submit that these Board proceedings are irrelevant to Houser's obligation to make employee benefit fund payments under the 1973 contract; a brief discussion of these proceedings is necessary, however, because of the issues presented by Houser in his Petition for Certiorari.

The Union subsequently filed additional charges against Houser alleging further violations of Sections 8(a)(1) and 8 (a)(5) of the National Labor Relations Act, as amended (Case No. 14-CA-8205). The Regional Director for Region 14 of the Board refused to issue a Complaint on these new charges (Pet. Appendix A-1; A-3). On appeal, the General Counsel of the Board sustained the decision of the Regional Director (Pet. Appendix A-4; A-6).

REASONS FOR DENYING THE WRIT

I. The Decision of the Court of Appeals Presents No Significant Question for Review and There Are No Special and Important Reasons for Granting a Writ of Certiorari.

This is a routine collection case which regrettably has found its way to the highest court in the land. Rule 19 of the Supreme Court Rules provides that review on writ of certiorari is not a matter of right but will be granted "only where there are special and important reasons therefor." Simply stated, the unpublished decision of the Court of Appeals below presents no special or important issue and in no respect warrants review by the Supreme Court of the United States.

The four questions presented in Petitioner's Petition for Writ of Certiorari (pp. 2-3) are thoroughly spurious and serve only to obfuscate the elementary nature of this case.

Petitioner's disingenuous analysis notwithstanding, the instant case is nothing more than a rudimentary suit under Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. §185 for the breach of the 1973 contract between the Union and Houser; the Trustees sued as third party beneficiaries to said contract. 29 U.S.C. §185 does not provide for, and did not function in this case as, a jurisdictional basis for review of a proceeding before the National Labor Relations Board.

A Board proceeding for an alleged violation of Sections 8 (a)(1) and (5) of the National Labor Relations Act, as amended, generically differs from a cause of action brought under 29 U.S.C. §185. In *La Mirada Trucking, Inc.*, 538 F.2d 286 (9th Cir. 1976) the Court of Appeals squarely stated:

> The National Labor Relations Board has no jurisdiction to consider cases arising from the breach of a current collective bargaining agreement. 538 F.2d at 288.

The above-quoted passage from *La Mirada, supra,* merely underscores the basic proposition that the Board has not been empowered to determine the existence of, or remedy, a breach of a collective bargaining agreement; the Board, as material herein, is empowered to adjudicate unfair labor practices and provide remedies therefor. In short, a decision of the National Labor Relations Board, or a refusal of the General Counsel to issue a Complaint, can never be binding on a court in a subsequent breach of contract action under 29 U.S.C. §185 because the dispositive issue in the latter proceeding (i.e., whether the contract has been breached) could not have been litigated before the Board. See *Fibreboard Paper Products v. Machinists Local 1304,* 344 F.2d 300, 304 (9th Cir. 1965).

In light of the above, the irrelevance of questions presented by Petitioner becomes manifest. All four of the questions presented by Petitioner are predicated on the fallacious proposition that the Board somehow in the context of an unfair labor practice proceeding determined whether Houser breached the 1973 contract by failing and refusing to make contributions to the District No. 9, I.A. of M. and A.W. Pension Trust and Welfare Association. Because the Board does not and cannot adjudicate a claim sounding in breach of a contract, Petitioner's argument that a Board decision (question one), or a refusal of the General Counsel to issue a Complaint (question two), is binding, or should be afforded substantial weight, in a suit under 29 U.S.C. § 185, is nothing more than sophistry. The third and fourth questions presented by Petitioner are equally frivolous.[3] The suit herein under 29 U.S.C. § 185 can in no wise be characterized as a "collateral review mechanism" (Pet. for

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[3] The third question purports to present the issue of whether a suit under 29 U.S.C. §185 may be utilized as a "collateral review mechanism" to review a decision of the Board in an unfair labor practice proceeding; the fourth question purports to present the same issue as it pertains to a refusal of the General Counsel to issue a Complaint (Pet. for Writ of Cert., p. 3).

Writ of Cert., p. 3) in that the dispositive breach of contract issue had not been previously determined and constituted a completely separate cause of action.

II. The Decision of the Court of Appeals Is Fully Consistent With the Statutory Scheme of the National Labor Relations Act and Applicable Decisions of This Court.

Both of Petitioner's "Reasons for Granting the Writ" (pp. 8-14) argue that Respondents were disenabled from bringing a breach of contract suit under 29 U.S.C. § 185 by virtue of the decision of the Board in an unfair labor practice case (Resps. Appendix A-2-A-26) and/or the subsequent refusal of the General Counsel to issue a Complaint on new unfair labor practice charges filed by the Union (Pet. Appendix A-1; A-6). The theoretical foundation of this argument is not easily discernible; in actuality, there is no legal theory that can provide valid support for Petitioner's argument.

It is clear that the jurisdiction of the District Court to adjudicate Respondents' claim under 29 U.S.C. § 185 was not pre-empted by the Board's jurisdiction to adjudicate unfair labor practice claims under Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(1) and (5). *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 268 (1964); *Smith v. Evening News*, 371 U.S. 195, 197 (1962).

Although Petitioner abjures specific reference to res judicata, it seems that Petitioner's argument is premised on this doctrine.[4] It is palpable, however, that neither the decision of the Board in the first unfair labor practice proceeding, nor the refusal of the General Counsel to issue a complaint in the second one, creates res judicata or collateral estoppel with respect to the instant case.

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[4] Petitioner's Brief to the Court of Appeals below expressly relied on the doctrine of res judicata (Brief for Appellant, pp. 14-20).

The doctrine of res judicata provides that a judgment on the merits is an absolute bar to a subsequent action between the same parties or their privies upon the same cause of action. 1B *Moore's Federal Practice* 621-622 (2d ed. 1965). Because a suit for breach of contract under 29 U.S.C. § 185 and an unfair labor practice proceeding predicated on alleged violations of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(1) and (5), are in no wise the same cause of action, the doctrine of res judicata is therefore transparently inapplicable to the instant case.

The corollary doctrine of collateral estoppel is equally inapposite. The doctrine of collateral estoppel provides that a judgment on the merits constitutes an estoppel between the parties to the judgment and their privies as to matters necessarily litigated and determined although the subsequent cause of action is different. 1B *Moore's Federal Practice* 621-622 (2d ed. 1965). It is incontrovertible that the refusal of the General Counsel to issue an unfair labor practice complaint creates neither res judicata nor collateral estoppel in that such a decision is merely a discretionary administrative action and is in no sense a judicial resolution on the merits. *Aircraft & Engineer Maintenance Employees, Local 290 v. I. E. Schilling*, 340 F.2d 286, 289 (5th Cir. 1965); *Thomas v. Consolidation Coal Co.*, 380 F.2d 69, 77-78 (4th Cir. 1967).

Further the decision of the Board finding Houser guilty of unfair labor practice violations did not estop the Union and the Trustees from filing suit for breach of contract under 29 U.S.C. § 185. It is elementary that collateral estoppel can be invoked only where the issue for which the application of the doctrine is sought has been actually litigated and determined, and where the determination of said issue is essential to the decision in the prior proceeding. *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876).

Even assuming, *arguendo*, that Judge Singer had found that the Appellant-Company was not bound by said collective bargaining agreement, such a finding would have been in no respect essential to his ruling on the central question of whether or not the Appellant-Company had committed an unlawful refusal to bargain. *Fibreboard Paper Products v. Machinists, Local 1304*, 344 F.2d 300, 304 (9th Cir. 1965) is squarely on point. The Court held that a finding of an Administrative Law Judge in a Section 8(a)(5) proceeding that there existed no contract between an employer and a union did not collaterally estop the union from asserting the existence of said contract in a subsequent breach of contract action. The Court stated:

> The questions which we thus contemplate as matters to be decided when the present case is heard are not matters properly to be brought before the Labor Board. Recovery in the present suit must be based upon an existing contract, and its obligations. Issues as to those matters were not, and could not be, before the Board. Its decisions deal with questions of unfair labor practices as defined in the Act; and breach of a collective bargaining agreement is not an unfair labor practice. 344 F.2d at 304.

In his conclusions of law, Board Administrative Law Judge Singer held that Houser (Respondent therein) had violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act by bypassing the Union and dealing directly and unilaterally with its employees, all in derogation of the Union's status as the exclusive bargaining representative (Resps. Appendix A-24). Can it be said that implicit in this conclusion is the finding that Houser was *NOT* bound by the 1973-1976 collective bargaining agreement? Clearly, the answer is no; and it is therefore equally clear that the doctrine of collateral estoppel therefore has no application to the instant case.[5]

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[5] In fact the Board found that Houser *was* bound to the 1973 contract. In footnote 29, Administrative Law Judge Singer found:

> "Contrary to Respondent's contention, the letter-agreement is more than an 'interim wage adjustment' and 'agreement to agree in the future.' The instrument expressly bound the parties to follow and apply the contract to be concluded by the Union and Employer Association—a not unusual procedure in dealings with 'independents' like Respondent. In any event, Respondent's contention that the letter-agreement is not 'enforceable' under 'basic contract law' is unsound. It has, moreover, repeatedly been pointed out that the strict rules governing 'ordinary contracts' do not necessarily apply to collective labor agreements. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550." (Resps. Appendix A-21).

Petitioner's argument consists primarily of a series of vacuous (and frequently erroneous) assertions punctuated by citations to decisions which have nothing to do with the case at bar. Petitioner has been unable to cite a single case where a court has held that a Board decision in an unfair labor practice proceeding forecloses a subsequent suit for breach of contract under 29 U.S.C. § 185. To the contrary, this issue was settled in *Smith v. Evening News*, 371 U.S. 195, 197 (1962) where this Court held that a cause of action under 29 U.S.C. § 185 of Labor Management Relations Act, as amended, is independent of, and in addition to, any remedies which may be obtained from the Board in an unfair labor practice proceeding.

CONCLUSION

Wherefore, for the foregoing reasons the instant Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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and LANGE
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727-0922
Attorney for Respondents

APPENDIX

DISTRICT 9
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS
12365 St. Charles Rock Road Bridgeton, Mo. 63044
(314) 739-6200
Joseph F. Cointin

Directing Business Representative
Fred Speckmann

Assistant Directing Business Representative

Russell L. Davis, Coordinator
James Redman, Coordinator
Clarence Bingaman, Coordinator
Kermit Burrows, Coordinator
Clarence Hanneken, Coordinator

I, the undersigned Employer, agree to put into effect 8/1/73 thirty-five cents (35¢) per hour wage increase across-the-board.

I also agree to abide by any settlement made under the Automotive Dealers Agreement, with the understanding that if the thirty-five cent (35¢) amount is in excess of the settlement, I may reduce to the settlement rate on the date of the settlement.

If the settlement rate is above the thirty-five cent (35¢) amount, I shall pay the increase retroactive to 8/1/73, and I further agree to accept all fringe costs on the date of settlement, including any retroactivity, and shall continue to operate under the provisions of the 1970-73 Agreement.

/s HOUSER AUTOMOTIVE
(Company Name)

By /s/ WM. HOUSER

Date 8/8/73

DISTRICT NO. 9, INTERNATIONAL
ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS
By /s/ FRANCIS FLANNERY
Business Representative

Pending Shop being leased out.

fms

OPEIU No. 13

JD-223-74
Granite City, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

WILLIAM CHARLES HOUSER, d/b/a HOUSER AUTOMOTIVE
Respondent

and

Case No. 14-CA-7594

AUTOMOTIVE, PETROLEUM AND ALLIED TRADES LOCAL UNION NO. 971, Affiliated With INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Case No. 14-CA-7600

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
Charging Parties.

Ross A. Friedman, Esq., St. Louis, Mo., for General Counsel.

Gerald Tockman, Esq. (Peper, Martin, Jensen, Maichel, and Hetlage), St. Louis, Mo., for Respondent.

Barbeau A. Roy, Esq. and **Mr. Francis Hicks** for Teamsters Local Union No. 971.

Mr. Forrest W. Brandon for Machinists, District No. 9.

Decision

SAMUEL M. SINGER, Administrative Law Judge: This proceeding was heard before me in St. Louis, Missouri, on December 19, 1973, and January 15-16, 1974, pursuant to charges filed on September 24 and 25, 1973, and complaint issued on November 12, 1973. The complaint, as amended at the hearing, alleges that Respondent violated Section 8(a)(1) and (5) of the Act. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Briefs were filed by General Counsel and Respondent. Upon the entire record[1] and my observation of the testimonial demeanor of the witnesses, I make the following:

Findings of Fact

I. Business of Respondent

Respondent Houser is engaged in the retail sale and distribution of automotive parts and automotive repair services at its two facilities in Granite City, Illinois. During the past representative year its gross sales exceeded $500,000 and its purchases in interstate commerce (from points outside Missouri) exceeded $50,000. I find that at all material times Respondent has been and is an employer engaged in commerce within the meaning of the Act and that assertion of jurisdiction here is proper.

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[1] Transcript corrected by my order on notice dated March 25, 1974.

II. Labor Organizations Involved

Automotive, Petroleum and Allied Trades Local Union No. 971, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters") is a labor organization within the meaning of the Act.

District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO ("Machinists") is a labor organization within the meaning of the Act.

A. Introduction; The Issues

The two facilities which Respondent operates in Granite City, Illinois are located at 18th and Madison Avenue ("Madison") and at Pontoon Road ("Pontoon"). It employs 12 men at Madison—8 in the automotive parts department and 4 in the machine shop; and 2 parts department employees at Pontoon, which began operations in June 1971. It is undisputed that all 10 parts department employees at the two facilities belong in the appropriate bargaining unit which Teamsters claims to represent.

The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with Charging Parties as exclusive representatives of his employees in each of the two appropriate bargaining units in his business—more specifically by unilaterally dealing and bargaining with unit employees with respect to terms and conditions of employment, including wages and insurance benefits. Respondent's basic contentions are (br. pp. 5, 8, 11, 16, 20, 24): (1) that neither labor organization was a "*bona fide* union representing Respondent's employees"; (2) that it "had a good faith doubt about the majority status" of each union; and (3) that General Counsel "has not met the required burden to establish the unfair labor practices charged."

B. Alleged Violations Involving Teamsters Local 971

1. Contractual relations; Teamsters' August 28 request for a new collective agreement and its unsuccessful attempt to sign up employees

Respondent and Teamsters have had signed collective agreements since at least 1964 or 1965. After negotiating and concluding an agreement with St. Clair-Madison Counties Area Automobile Dealers, the Union would submit the agreement for approval to "independents" such as Respondent. The last "standard" 3-year area contract expired on July 31, 1973.[2] That agreement contained the unusual provisions on such subjects as classification and wages, welfare and pension, grievance-arbitration, union security, and dues-checkoff.[3]

On August 28, Teamsters President Hicks asked Houser at his Madison facility to sign a new agreement.[4] Houser referred Hicks to his lawyer, who he indicated would conduct "any negotiations that are done." Hicks said, "No, I don't want to talk to him, I want to talk to you."[5] He nonetheless later met with

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[2] Unless otherwise indicated all dates herein are 1973.

[3] It is unnecessary to resolve Houser's disputed testimony that the 1970-1973 contract was "forced" upon him by a threat (supported by "a carload of pickets") that he "either sign" or face a picket line.

[4] Hicks fixed the date as "about" August 22, but Houser (supported by employees) placed it as August 28. Although Hicks at first indicated that he had notified independents (including Houser) that they had the choice of bargaining "individually," on cross-examination he admitted stating in his pre-hearing affidavit that he "never sent [Houser] a letter offering this choice."

[5] The above finding is based on Houser's credited testimony. Hicks admitted telling Houser, "I didn't have a contract with [Houser's] lawyer, I had a contract with him." I do not credit Hicks' further testimony that Houser also told him "to get the hell out and don't come back." Hicks impressed me as a highly partisan witness, prone

Houser's attorney, who took the position that Respondent was "not obligated to negotiate" with the Union.

On the same day (August 28)—before he spoke to Houser about contract negotiations—Union President Francis Hicks approached two employees and requested them to join the Union. He told employee Ronnie Hicks that he "had come to sign [him] up"; the employee replied, "No, I don't want anything to do with the Union." To employee Francis he said, "I am here to join you up for the union. If you don't join I'm going to have to put a picket line up and have your job." Francis told him "to get screwed."[6]

2. Limited implementation of the 1970-1973 collective agreement

It is undisputed that prior to the expiration of the 1970-73 collective agreement (July 31, 1973) Respondent neither paid its employees the wage rates established by that agreement nor complied with other contract terms such as those involving health, welfare, and pensions. Thus, employee David Francis

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to exaggerate. Houser's denial that he made the remark attributed to him is corroborated by employee Ronnie Hicks who overheard the conversation. Nor do I credit Union President Hicks' testimony that he had made "about four trips" to the Madison facility after he mailed Houser the 60-day contract termination notice in May, ostensibly to negotiate; he gave specifics only as to two—a conversation with an employee (David Francis) whom he attempted to sign up allegedly at the end of July and the meeting with Houser on August 28 (August 22 according to Hicks). I credit Houser's testimony that he had no more than two or three contacts with Hicks in the 1970-73 period —among them the personal August 28 meeting already described, and a telephone call in answer to Hicks' call concerning the latter's August 14 letter requesting a meeting on grievances (*infra*, sec. B. 2). Houser also testified credibly that he had not seen Hicks since August 28.

[6] These findings are based on the mutually corroborative testimony of Francis, Houser, and Ronnie Hicks. Union President Hicks first testified that the card solicitations took place at the end of July, before the contract expired. On cross-examination he fixed the event as "around the first week of August," *after* the contract expired.

was hired as a counterman in June 1973 at $3 an hour, although he was entitled to the higher ($3.64) rate specified in the contract for men of his (4-5 years) experience; Francis never joined Teamsters, having told Houser at the time of hire that he "didn't want no part of the Union." Employee Jones, one of four Teamsters' members in the 10-man bargaining unit and employed as a stockman and deliveryman, was paid a flat weekly wage, although the contract stipulated an hourly wage scale for that classification—yielding a higher weekly income from that he received. Finally, employee McAllister, a counterman and deliveryman (employed for 4 years) and also a Teamsters member, was likewise paid less than the hourly contract rate; he testified that he did not complain about his wages because it was well known that "Houser didn't work under the contract to begin with."

Nor did Respondent comply with the contract provisions governing health and pension payments. Houser had given his employees the option to subscribe to the Union health insurance plan or the Company's group hospitalization plan with Sentry Insurance Company.[7] In either case, he contributed to premiums—"the whole thing" to the Company plan. The record shows that three employees, all union members (Jones, Twele, and Lindenberger), have filed claims for hospitalization and medical payments under the Union insurance plan.

As to pensions, Respondent has remitted monthly payments only for the four Union members (Jones, McAllister, Twele and Lindenberger)—although the 1970-1973 collective agreement required welfare-pension payments for all employees in the unit.[8] Payments on behalf of these men since expiration of the agreement have been "under protest."

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[7] The Sentry plan, introduced in 1966, covers office personnel as well as unit employees subscribing thereto.

[8] Union President Hicks recalled meeting with Houser in 1971 to settle the amount of payments due the Union for newly signed-up members (McAllister, Lindenberger, and Pollick); there is no credible evidence of any such meetings in 1972 and 1973.

Although the 1970-73 collective agreement contained a union-security clause requiring membership after 30 days employment and a dues-checkoff authorization clause, Respondent has transmitted dues only for the four Teamsters' members. It appears that the Union invoked the union-security clause but once during the 3-year life of the contract—against Union member Jones on August 30, 1971—although invariably there were six non-dues paying employees (nonmembers) on the Company payroll.[9] According to Houser, dues payments were made for "[w]hoever . . . were in the Union that wanted it deducted from their pay." Credited evidence indicates that the Union did not approach or solicit employees to join the Union until after the July 31, 1973 expiration date of the collective agreement.

The record fails to show the processing of a single grievance under the grievance-arbitration clause prior to the July 31, 1973 contract expiration date. By a letter dated March 17, 1971, the Union did request a meeting with Respondent to discuss "numerous" claimed violations of the agreement, but it never followed through. Although Houser suggested a meeting on a date other than that proposed in the letter, he "didn't hear anything else about it."[10] There is no evidence of any union action or reaction to Respondent's July 6, 1972, discharge of two

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[9] Jones, one of the Union's four members, apparently was not terminated; he is still in Respondent's employ.

[10] I do not credit Hicks' disputed testimony that he had "occasion to ask . . . twice" between 1970 and 1973 for records disclosing the employees on the payroll so he could process grievances. His testimony on this point was vague and evasive. Asked on cross-examination whether he had ever filed an unfair labor practice charge for refusal to submit information "needed to handle the contract," Hicks answered, "No, I am in the process of doing that with you now." Hicks apparently referred to a grievance filed by Union member Jones on August 19, 1973,—*after* expiration of the last collective agreement —complaining about his pay and a possible layoff. The parties never met to consider this grievance.

Union members—Pollick and Hoppe[11]—the latter for absences. Copies of the termination notices were mailed to Union President Hicks.

3. Petitions repudiating Teamsters

As previously noted, prior to the July 31, 1973, contract expiration date, only 4 of the 10 unit employees were Union members.[12] In July or August 1973, Ronnie Hicks, a nonmember inaugurated a drive to oust the Union. According to Ronnie Hicks, employees had told him that they were "dissatisfied" with Teamsters, especially because the Union was "never" around and they had no adequate representation. Among the matters discussed was the case of Crawford, a Teamsters' member, who had encountered difficulty proving to the Union's satisfaction his entitlement to retirement benefits before he finally got it on leaving Respondent in March or April 1973.

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[11] Hicks testified that he signed up Pollick in August or September 1971. Hoppe was later reemployed at the Pontoon facility, but did not rejoin the Union.

[12] I do not credit Business Agent Hicks' testimony that he had been hampered in signing up additional employees during the life of the 3-year contract by alleged Company obstructions and Union hostility. Thus, the record does not support his claim that Houser had instilled fear in employees or "got rid" of them as soon as Hicks found out they were on the Company payroll; on the contrary, Hicks' own testimony establishes that when Union member Crawford in August 1971 supplied him with a list of nonmembers, Hicks readily signed up three nonmembers (McAllister, Lindenberger, and Pollick) without any hindrance or opposition on the part of Respondent. McAllister, a General Counsel witness, testified that he signed a union card when told by Union representatives that he "had to join"; he did not even suggest any employer intimidation. Hicks' assertion that he was unable to sign up others (admittedly only 4 of the 12 employees in Respondent's parts department in August 1971 were Union members) because they were part-time students, or laid off, or simply "disappeared" is typical of his dramatic and speculative testimony (*supra*, fn. 5)—unsupported by credible evidence. It is noteworthy that it was not until McAllister was on the job for 2 years that the Union finally approached him to sign a card.

According to Ronnie Hicks, he talked to all 10 employees in the parts department before and after the Teamsters' contract expired on July 31 and had "many times," called to Houser's attention, the employees' dissatisfaction.

On September 6, Ronnie Hicks prepared and circulated a petition calling for rejection of Teamsters as bargaining representative; eight of the ten parts department employees signed it.[13] The next day (September 7), Ronnie Hicks filed with the Board a petition for decertification of the Union.

After receiving a copy of the decertification petition, Houser on September 10 or 11 posted a "notice" on the Company bulletin boards to the effect that the Board "will hold a secret ballot election[s] so you all can vote on your right to have or not have a Union."[14] Ronnie Hicks removed one of the notices, wrote on it "the undersigned does not want union representation from Local 971 Teamsters . . .," and obtained the signatures of seven parts department employees.[15] The anti-union note was then placed on Houser's desk.[16]

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[13] The signers included two Union members (McAllister and Lindenberger); two other members (Jones and Twele) did not sign. One signer, Oros, left Respondent's employ shortly after September 6. The record does not support General Counsel's claim that Robinson, another signer, was a supervisor, excluded from the unit.

[14] The notice was addressed to all Company employees, including four in the machine shop. As hereafter noted, machinst Gansner filed a like decertification petition on the same day.

[15] As hereafter noted (Sec. c. 3), the four machinists also signed this note.

[16] General Counsel adduced evidence (through his witness McAllister) that Respondent in November 1973 induced McAllister, a Teamsters' member, to write a letter to the Union withdrawing his membership. McAllister, who signed both of Ronnie Hicks' anti-union petitions, wrote the letter. I make no findings as to whether this conduct constituted an independent Section 8(a)(1) violation since the complaint alleges (and the parties at the hearing litigated) only refusal to bargain charges based on unilateral Company actions resulting from Respondent's withdrawal of Teamsters recognition.

5. Conclusions

a. It is settled that although a contracting union is presumed to represent a majority of the employees in the bargaining unit during the life of a collective agreement, this presumption may be overcome by a showing: (i) that the union no longer enjoys majority support; or (ii) that the employer entertains a good-faith doubt concerning its continued majority. See, e.g., *Terrell Machine Company v. N.L.R.B.*, 427 F. 2d 1088, 1090 (C.A. 7); *N.L.R.B. v. Little Rock Downtowner, Inc.*, 414 F. 2d 1084, 1090-91 (C.A. 8); *Komatz Construction, Inc. v. N.L.R.B.*, 458 F. 2d 318, 326 (C.A. 8). Manifestly, the good-faith doubt must have "a rational basis in fact" (*N.L.R.B. v. Rish Equipment Co.*, 407 F. 2d 1098, 1101 (C.A. 4) and amount to "something more than a self-serving assertion." *Little Rock Downtowner, Inc., supra*, 414 F. 2d at 1091. In my view, the objective facts amply support the conclusion that Respondent entertained a reasonably grounded good-faith doubt concerning Teamsters' majority on or about the July 31, 1973 expiration date of the last (1970-1973) collective agreement.

b. The record establishes that Teamsters neither administered the bargaining contract nor serviced the unit employees to any significant degree. Its failure to implement important contractual provisions such as those on wages, health and welfare, and pensions not only deprived the employees of benefits, but left to the Employer the opportunity unilaterally to impose working conditions. Nor did Teamsters process any grievances—not even the single grievance filed by one of its members (Jones)—during the 3-year term of the contract. In addition to this indifference to employee interests, it did not bother to enforce the union-security and dues-checkoff provisions as to all unit employees. Apparently it was content to collect dues and contributions (on welfare and pensions) from the few members —4 of 10 employees in the unit. The Union's representative

rarely visited the facilities—only two or three times in 3 years. Its contacts with the Employer were just as infrequent.

Surely such inactivity, if not dormancy, afforded Respondent a proper and legitimate basis for a good-faith doubt of majority status. See *Southern Wipers, Inc.*, 192 NLRB 816; *Viking Lithographers, Inc.*, 184 NLRB No. 16 (74 LRRM 1407). Indeed, the presumption of continued majority status which flows from existence of a collective agreement does not even apply where, as here, "it is evident from the practice under this and earlier contracts that the parties had no intention of entering into a real collective-bargaining relationship." *Bender Ship Repair Company, Inc.*, 188 NLRB 615, 616; *Ace-Doran Hauling & Rigging Co.*, 171 NLRB 645; *Glenlynn, Inc.*, 204 NLRB No. 45 (83 LRRM 1356).

c. Respondent's doubt of Teamsters' representative status was reasonably fortified by the expressions of employee dissatisfaction with the Union which had come to its attention. Anti-union employee Ronnie Hicks launched his drive to oust Teamsters at or about the time the 1970-73 contract expired, reported on the employees' dissatisfaction to Houser, and intensified his anti-union drive in early September when he circulated two petitions repudiating Teamsters. The first (circulated on September 6) was signed by 8 of the 10 unit employees—including half (2 out of 4) of its membership; 7 employees (including the same two members) signed the second petition. Significantly, the Union took no steps to sign up employees until August 28, a month after the contract expired; and the only two who were approached (Francis and Ronnie Hicks) made it clear that they wanted nothing to do with Teamsters.

Clearly, this strong employee dissatisfaction and defection of even members (two, constituting half of the total membership) afforded Respondent additional ground for believing that Teamsters failed to represent a majority of the employees in the unit

(parts department) claimed by the Union. See *Komatz Construction, Inc. v. N.L.R.B.*, 458 F.2d 318, 32[illegible] (C.A. 8); *Viking Lithographers, Inc.*, 184 NLRB No. 16 [illegible]4 LRRM 1407, 1408).

d. Having found that Respondent entertained a good-faith doubt concerning Teamsters' majority after the last (1970-73) collective agreement expired, it is unnecessary to decide the additional issues raised, namely, whether Teamsters did in fact have a majority on and after the July 31, 1973, expiration date; and whether, as the complaint alleges, Respondent engaged in unilateral dealings with his employees as to wages and insurance benefits. An employer entertaining a good-faith doubt in circumstances such as here presented at the end of a contract term is entitled to a determination of the Union's majority status in a Board-conducted secret election.

I find and conclude that Respondent did not violate Section 8(a)(1) and (5) of the Act insofar as any alleged unilateral action it may have taken *vis-a-vis* employees in the parts department—the unit claimed to be represented by Teamsters.

C. Alleged Violations Involving Machinists District 9

1. Contractual relations; Respondent's August 8 agreement to abide by the expired (1970-1973) contract and by a new contract to be negotiated by the Union and Employer Associations

Respondent's contractual relations with Machinists date back to at least 1962. As an "independent," Respondent would be requested to sign the "standard" contract previously concluded between the Union and the area Automotive Asso-

ciations.[17] If the contract was unsatisfactory, Respondent had the "right, as an individual employer . . . to sit down and bargain individually"—but this "[i]n the past . . . never . . . happened." Respondent's last "standard" 3-year contract with Machinists, like its contract with Teamsters (covering the parts department), expired on July 31, 1973. As already stated (*supra*, sec. A), Respondent employs four machinists at its Madison and none at its Pontoon facility.

On August 8, 1973 Business Agent Clanney, accompanied by another Union representative, went to the Madison facility and showed Houser "a letter of agreement" (drawn by St. Clair-Madison Automotive Association and the Union) which he was requesting individual dealers to sign, pending conclusion of a collective agreement between the Union and the Association. In the main, the letter stipulated that the signatory employer put into effect (as of August 1, 1973) a 35-cent "across-the-board" hourly wage increase; that he "abide by any settlement [to be] made under the Automotive Dealers Agreement," including as to wages and fringe benefits; and that in the interim he "continue to operate under the provisions of the [expired] 1970-73 Agreement." Clanney explained to Houser the effect of the retroactive feature of the letter-agreement and indicated that if he subscribed to it he could continue to "work without interruption and without [a] possible strike."[18] Houser read the letter and signed it, with the notation, "Pending Shop being leased out"—telling Clanney that "it really didn't make too much difference . . . anyway because . . . he was probably going to lease his shop to his

[17] Greater St. Louis Automotive Association, Inc., and St. Clair-Madison Automotive Association, Inc.

[18] Several members of St. Clair-Madison Association (representing employers in Respondent's area) were struck one day (August 6), at the end of which that Association signed the "letter of agreement." St. Louis Association apparently failed to sign the agreement and was struck until September 4 when the negotiated collective agreement was ratified by the Association.

employees." As hereafter indicated, Respondent previously (in July) met with its machinists to discuss the possibility of leasing out this phase of his business.[19]

2. Extent of implementation of the 1970-1973 collective agreement

Unlike in the case of Teamsters, it appears that Respondent has complied with the wage provisions of the 1970-73 collective agreement; and also with the 35-cent hourly increase stipulated in the post-contract (August 8) letter-agreement.[20] Thus, Farrow, one of the three journeyman machinists testified credibly and without contradiction that he was paid "the union scale" and got the additional 35 cents after the new contract was "ratified." Gansner testified that he, too, got the "union scale"—the "same rate" as Farrow.[21] Plafcan, the third ma-

[19] The above findings on the August 8 meeting are based primarily on the testimony of Clanney and in part on that of Houser. Although by no means neutral in the dispute, Clanney impressed me as an essentially credible witness. He freely admitted facts adverse to his Union's cause, as, for example, his rare visits to the facility to service the employees (*infra*, sec. B 2)—in contrast to Houser who frequently strove to avoid everything damaging to his case. As between Claney and Houser, I prefer to rely (and usually rely) on the testimony of Clanney—on the basis of both quality and content as well as comparative demeanor.

[20] The 1970-1973 collective agreement had established hourly rates with a weekly "guarantee per week."

[21] Contrary to General Counsel's contention, Gansner is not a supervisor excludable from the machinist unit. Credited evidence establishes his duties to be of a routine rather than managerial nature and, as noted above, he is paid the rank-and-file hourly rate. Like other unit employees, he works on automobiles (rebuilding engines), orders parts, and punches a timecard. While he will tell employees about work to be done on automobiles, this is largely because he has been designated to talk and deal with customers—a task also performed by another senior employee (Farrow) in Gansner's absence. As a more experienced man, he sometimes assists an employee (like apprentice Diel) with problems, but he has no authority to reprimand —let alone hire and fire—employees. If an employee (like Plafcan)

chinist, testified that he was paid "according to the contract" and got his 35-cent hourly increase within a week or two after August 6.[22]

Respondent has not fully complied with the contract provisions on welfare and pensions. Thus, it has remitted monthly payments only for two of the four employees in the machine shop—i.e., Farrow and Plafcan, the only two Union members. The contract itself provides for contribution "for each employee" covered by the agreement.[23] As in the case of Teamsters, payments on behalf of the two have been made "under protest" since expiration of the 1970-73 collective agreement.

As to the processing of grievances under the contract Business Agent Clanney testified that none was handled because none was filed. Plafcan and Farrow, the two Union members, testified that they had had no problems or complaints to take up with the Union.[24] Clanney rarely visited Respondent's facility, recalling only one visit in 1973 and two during the 3-year contract.[25]

talks to Gansner about time off (coming in late or leaving early), the conversation is in the nature of a notification rather than request for permission. I find that Gansner was at best a leadman or "straw boss," not "requir[ing] that [he] be put in the supervisory class." (*N.L.R.B. v. Browne & Sharpe Mfg. Co.*, 169 F. 2d 331, 335—C.A. 1). See also *United Resources, Inc.*, 200 NLRB No. 142 (82 LRRM 1168) and cases therein cited. Nor is it determinative that Gansner was designated by his employer as "working shop foreman" or known by employees as "machinist supervisor." The "important thing is the actual duties and authority of the employee, not his formal title." *N.L.R.B. v. Quincy Steel Casting Co.*, 200 F. 2d 293, 296 (C.A. 1).

[22] There is no evidence as to the wage scale of Diel, the fourth machine shop employee—an apprentice with Respondent for 1 year until he quit on November 20, 1973.

[23] Houser testified that he was unfamiliar with the contractual requirements, including the requirement (not found in the Teamsters contract) that the employer shall inform the Machinists of all new hires. According to Business Agent Clanney, he knew of only two machinists in Respondent's employ "because that's all the employees . . . [Houser] had been paying on for a number of years."

[24] Both admitted receiving notices of union meetings, but attended none.

Finally, as to payment of dues, the Machinists contract (unlike the Teamsters) contains no checkoff provision and none were remitted by Houser to the Union. The contract union-security clause does, however, require membership after 30 days employment. As indicated, this clause was not enforced as to two of the four unit employees (Gansner and Diel). The two Union members (Plafcan and Farrow) paid their dues directly to the Union.

3. The petitions repudiating Machinists

On September 7, 1973, Gansner, an avowed antiunion employee, circulated a petition in the machine shop reading:

> We don't want District of I.A.&M. to represent us at Houser Automotive any more.

While two of the four machinists (Gansner and apprentice Diel) signed it, the others (Union members Plafcan and Farrow) refused. Gansner testified that he got "the idea" of filing a decertification petition with the Board from parts department employee Ronnie Hicks who was then filing a like petition to reject Teamsters (*supra*, sec. B. 3).[26] On the same day (Sep-

[25] Clanney's contracts with Houser were equally sparse. Houser testified that he saw him at the facility only once prior to August 8 and talked to him once (June 1973) by telephone. In the latter, Clanney complained that Respondent did not make his welfare and pension payments in the beginning of the month as required by the contract. Clanney sought to explain his infrequent contracts with employees and dealers like Houser by the fact that he services numerous shops with numerous employees, stating that he visits the facilities when "they had a problem or if . . . a grievance is filed."

[26] According to Gansner, he did not discuss his intention with Houser. He testified, however, that he had previously reported his and his fellow employees' dissatisfaction with Machinists—both before and after the Machinists' contract expired. Pressed on cross-examination when he talked to the three other machinists about their

tember 7), Gansner filed the formal decertification petition with the Board as did Ronnie Hicks.

As previously noted (fn. 14), Houser thereafter (September 10 or 11) posted notices to all employees (machinists as well as parts department employees) that the Board would conduct an election and employee Hicks wrote on one of the notices a petition stating that "the undersigned does not want union representation from Local 971 Teamsters or District 9 I.A.ofM." In addition to securing signatures from his fellow employees in the parts department, Hicks secured those of all four machine shop employees. Plafcan, who is still a Union member, testified that he signed this petition voluntarily, but only because "everybody else was signing."

On his visit to the facility on October 1 or 2, Business Agent Clanney asked Farrow whether he signed Hicks' petition because the Union "hadn't represented him," Farrow answered that he "didn't have nothing against" the Union, but that he "just signed it." When he asked Gansner "how come [Gansner] had filed a decert.," the latter said that he "didn't want to belong to any union."

On November 22, 1973, Farrow resigned from the Union, stating that "As of this date, I . . . do not want to be represented by District 9." He had been a member of a union for 22 years.

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alleged dissatisfaction, Gansner answered "Oh, the last two years." He then became vague and evasive as to the employees' specific complaints, stating that they "just didn't like" the Union and that "I don't speak for them." I do not credit Gansner's testimony on this point. Houser similarly testified about reports of dissatisfaction from the machine shop employees "on several different occasions" prior to expiration of the Machinists contract, but he, too, was vague as to the nature of the dissatisfaction. Alluding to a meeting with his four machinists at the end of July 1973 to discuss the possible leasing of the shop to his employees (*infra*, sec. C.), he emphasized that the men "just weren't satisfied with their representatives," but then added that "their purpose" in exploring the possible leasing of the shop was "to better themselves" since they "thought that they could make more money doing their work that way than they could working hourly."

4. Respondent's alleged July 1973 unilateral dealings with employees concerning leasing of the machine shop and coverage under the Company insurance plan

At the end of July 1973, prior to expiration of the Machinists contract, employees Gansner and Farrow decided to talk to Houser about "either leasing the shop or working on a percentage" so that they "could make a little more money." They talked the subject over with the two other machinists and all four then met with Houser. Houser told them that it was all "up to" the men as to what they wanted to do. According to Gansner, Houser "seemed to think" it could be arranged. Houser testified that he told them "to try to figure out something that would be satisfied with [sic] and would be fair to both sides and [then] present me with it and we would try to go from there."[27]

Also during the meeting Plafcan and Farrow asked whether they would be eligible for the Company insurance (covered by Sentry Insurance Co., *supra*, sec. B. 2) if the employees leased the shop. Houser answered (as he testified) that the plan was "available to anyone who wants it."

In November 1973, after resigning from the Union, Farrow joined the Company's group (Sentry) hospitalization plan. As previously noted (sec. B. 3), Respondent pays all the premiums on behalf of employees subscribing to this plan.

5. Conclusions

a. The legal principles applicable here have already been stated (*supra*, sec. B. 5). If, as in case of Teamsters, Respondent

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[27] I do not credit Plafcan's testimony that Houser also threatened "to shut the shop down" if it was not leased—a threat attributed to Houser only by Plafcan. To begin wtih, Plafcan's recollection of the meeting was poor. On close cross-examination he recalled material facts such as the fact that "the idea of leasing the shop" originated with the employees, that Houser told them the decision on this was up to them, and that the employees had asked Houser to "consider" their offer. Under the circumstances it is hard to believe that Houser threatened to close the shop unless it was leased.

can show—and the burden is his—that he had a good-faith doubt concerning the Union's majority at or on about the time the last collective agreement expired (July 31, 1973), then Respondent was free to withdraw recognition from Machinists and deal directly and unilaterally with employees in the unit theretofore represented by Machinists. For reasons to be stated, Respondent made no such showing as to Machinists.

b. To be sure, some of the factors supporting Respondent's good-faith doubt as to Teamsters are likewise present as to Machinists. Thus, Machinists' contacts with the unit employees and Employer during the life of the 3-year (1970-73) contract were minimal; but Machinists represented only a 4-man unit (as opposed to the 10-man Teamsters unit) and opportunities for servicing this small unit were more limited. Nor did Machinists process any grievances; but there is affirmative evidence that at least two of the four unit employees had no problems or complaints to take up with the Union. Moreover, the glaring Teamsters dereliction in failing to process the formal grievance instituted by a unit employee is here absent. Even more significant is the fact that there is no evidence of the wholsale failure by Machinists to implement the provisions of the collective agreement as was the case by Teamsters. Thus, the undisputed evidence establishes that as to the most significant working condition—wages— there was complete compliance by Respondent, with employees (including nonmember Gansner) receiving the full "union scale." Finally, there is no showing of widespread dissatisfaction with Machinists at or about the time the contract expired. Fully one-half of the unit (two of the four employees) were Union members and paid their dues.[28] Insofar as appears, one of the four, Gansner, first unveiled his antiunion bias when he circulated the September 7, 1973 antiunion petition (signed

[28] The fact that the other two were nonmembers does not in and of itself establish that they did not want Union representation. See *Terrell Machine Company v. N.L.R.B.*, 427 F. 2d 1088, 1090 (C.A. 4).

by himself and Diel only) stating that they did not want Machinists "any more." Nor is there any evidence as to Diel's sympathies (for or against representation) prior to this time. The fact that all four unit employees broached the subject of leasing the shop (in July 1973) is of no consequence; credited evidence establishes that the basic motivation was the potential to "make a little more money," not to avoid representation by Machinists.

c. Most significant, if not determinative, on the issue of good-faith doubt is Respondent's voluntary acceptance and signing of the "letter-agreement" presented to it on August 8, 1973—only a week after the last contract expired. Respondent thereby undertook to "continue to operate under the provisions of the [expired] 1970-1973 Agreement" with Machinists. It also agreed "to abide by any settlement" to be reached by Machinists and the Employer Association in pending negotiations and, in the interim, to put in effect a 35-cent across-the-board hourly increase—which it implemented faithfully. These actions do not depict an employer in doubt as to the Union's majority status. The presumption flowing from its past contractual relations with Machinists was enhanced by the execution of the new agreement. Even if previously quiescent, Respondent's action operated not only formally to renew or extend, but also to breathe new life into the technically expiring formal contractual relationship.[29]

I find and conclude that Respondent did not establish that it had a good-faith doubt as to the Union's majority and, there-

[29] Contrary to Respondent's contention, the letter-agreement is more than an "interim wage adjustment" and "agreement to agree in the future." The instrument expressly bound the parties to follow and apply the contract to be concluded by the Union and Employer Association—a not unusual procedure in dealings with "independents" like Respondent. In any event, Respondent's contention that the letter-agreement is not "enforceable" under "basic contract law" is unsound. It has, moreover, repeatedly been pointed out that the strict rules governing "ordinary contracts" do not necessarily apply to collective labor agreements. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550.

fore, that it was and is under legal obligation to recognize and bargain with the Union.[30]

d. There remains the question whether General Counsel has established—and in this instance it is his burden—that Respondent directly and unilaterally dealt with unit employees concerning wages and insurance benefits. As to wages, the complaint alleges that Respondent bargained individually with the employees "about becoming independent contractors" and earning higher wages. This allegation, as well as the one involving unilateral insurance dealing, relate to the late July 1973 meeting between Houser and the four machinists on leasing the shop to the men or allowing them to work on higher percentages. While no final decisions were reached, Houser and the men did discuss the proposals. The meeting ended with Houser stating that it was all "up to" the men and (in Houser's words) that they should "try to figure out something that would be . . . fair to both sides" and then present a proposal for further consideration. As the Supreme Court long ago stated "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive . . . it exacts 'the negative duty to treat with no other.'" *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 683-84. Accordingly, an employer may not bypass and ignore the exclusive bargaining representative and, as here, deal directly with his employees. See *N.L.R.B. v. Katz*, 369 U.S. 736, 742-43. Contrary to Respondent's contention, it is of no consequence that the "employees themselves instituted the leasing idea" or, if they did not, that they acquiesced in the direct dealing. See *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 687. It should be noted that the unilateral dealings here occurred prior to expira-

[30] The employees' withdrawal petitions and Union's majority loss —coming as they did after Respondent's refusal to recognize and bargain with Machinists—must be attributed to Respondent's unlawful conduct. Cf. *N.L.R.B. v. Decker*, 296 F. 2d 338, 342 (C.A. 8); *Toltec Metals, Inc.*, 201 NLRB 149 enfd. 85 LRRM 2346 (C.A. 3).

tion of the 1970-73 contract when, under Board law, "the presumption of [Machinists'] continuing majority [was] virtually conclusive." *United Aircraft Corp.*, 168 NLRB 480, 486. See also *Valleydale Packers, Inc.*, 162 NLRB 1486, 1491, enfd. 402 F. 2d 768 (C.A. 5).[31]

e. As to the alleged unilateral dealings on insurance, credited evidence establishes no more than that in course of the same (July 1973) meeting on leasing, Houser, in response to apparently casual inquiries from two employees as to whether the Company insurance plan would be available if the employees leased the shop, stated that the plan was "available to anyone who wants it." I do not regard this casual, passing exchange as of sufficient importance to warrant a finding of violation.

Nor does the record support the allegation in the complaint (by amendment at the hearing) that Respondent since November 1973 has unilaterally granted insurance benefits "to discourage nonmembership in the Machinists." The record shows only that Farrow, a unit employee recently resigned or withdrawn from the Union, joined the Company group (Sentry) hospitalization plan. Insofar as appears, Farrow's action was purely voluntary and not the result of any dealing or urging—let alone coercion —on the part of Respondent.

[31] I also reject Respondent's further contention that Machinists "waived negotiation of the leasing issue" because when Business Agent Clanney spoke to Houser on August 8, 1973 (the date the "letter-agreement" was signed) he indicated that the "leasing possibility . . . was immaterial." In my view, Clanney's statements did not satisfy the "clear and unmistakable" waiver which must be shown to justify nonconsultation on a mandatory bargaining subject. *N.L.R.B. v. Perkins Machine Co.*, 326 F. 2d 488 (C.A. 1). See also *Armstrong Cork Co. v. N.L.R.B.*, 211 F. 2d 843, 848 (C.A. 5). It should be noted that the leasing meeting with the employees at the end of July already was a *fait accompli* when Houser mentioned it to Clanney on August 8. I cannot find that the Union "knowingly" (*N.L.R.B. v. Gulf Atlantic Warehouse*, 291 F. 2d 475, 477—C.A. 5) waived its statutory right to consultation.

On the basis of all of the foregoing and the entire record, I conclude that Respondent has not established good-faith doubt concerning the Machinists' majority; that it has not rebutted the presumption of majority flowing from the existence of prior contractual relations; and that its direct and unilateral dealings with employees concerning the leasing of the machine shop constituted a refusal to bargain in violation of Section 8(a)(1) and (5) of the Act.

IV. Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of the Act.

2. At all material times District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO (Machinists) has been and is a labor organization within the meaning of the Act.

3. At all material times "Machinists" has been and is the exclusive representative of all employees in the bargaining unit set forth in the August 1970-July 1973 collective agreement between said union and Respondent, for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. Respondent has violated Section 8(a)(1) and (5) of the Act by bypassing Machinists in derogation of its exclusive representative status, and by directly and unilaterally dealing with its employees concerning terms and conditions of employment.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated Section 8(a)(1) and (5) of the Act by directly and unilaterally dealing with employees in a bargaining unit claimed to be represented by Teamsters Local 971.

V. The Remedy

Respondent having engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, should be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Such affirmative action will include the requirement that, upon request, Respondent bargain collectively in good faith with Machinists as the exclusive representative of its employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

Upon the foregoing findings of fact, conclusions of law, the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:[32]

ORDER

William Charles Houser, d/b/a Houser Automotive, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith with District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of his employees in the appropriate unit represented by said Union.

(b) Bypassing said Union in derogation of its exclusive representative status and bargaining directly and unilaterally with employees in the unit it represents.

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[32] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order which follows herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

(c) In any like or related manner interfering with the efforts of said Union to bargain collectively on behalf of the employees in the unit it represents.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request, meet and bargain with the above-named Union, as the exclusive representative of all employees in the appropriate bargaining unit, and embody in a signed agreement any understanding reached.

(b) Post at his place of business at 18th and Madison Avenue, Granite City, Illinois, copies of the attached Notice marked "Appendix."[33] Copies of said Notice, on forms provided by the Regional Director for Region 14, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said Notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated at Washington, D. C. Mar. 29, 1974.

/s/ SAMUEL M. SINGER
Administrative Law Judge

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[33] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the Notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."